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Executive Orders: Issuance, Modification, and Revocation

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Summary

Executive orders, presidential memoranda, and proclamations are used extensively by Presidents to achieve policy goals, set uniform standards for managing the executive branch, or outline a policy view intended to influence the behavior of private citizens. The U.S. Constitution does not define these presidential instruments and does not explicitly vest the President with the authority to issue them. Nonetheless, such orders are accepted as an inherent aspect of presidential power. Moreover, if they are based on appropriate authority, they have the force and effect of law. This report discusses the nature of these written instruments, executive orders in particular, with a focus on the scope of presidential authority to execute such instruments, as well as judicial and congressional responses to their issuance.

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Introduction

Executive orders are one vehicle of many through which the President may exercise his authority. While the President's ability to use executive orders as a means of implementing presidential power has been established as a matter of law and practice, it is equally well established that the substance of an executive order, including any requirements or prohibitions, may have the force and effect of law only if the presidential action is based on power vested in the President by the U.S. Constitution or delegated to the President by Congress. The President's authority to issue executive orders does not include a grant of power to implement policy decisions that are not otherwise authorized by law. Indeed, an executive order that implements a policy in direct contradiction to the law will be without legal effect unless the order can be justified as an exercise of the President's exclusive and independent constitutional authority.[1]

This report first reviews the "definition" of an executive order and how it is distinguishable from other written instruments, and then provides an overview of the President's constitutional authority to issue such directives. Next, the report discusses the legal framework relied on by the courts to analyze the validity of presidential actions, and also discusses the roles of the President and Congress in modifying and revoking executive orders.

Definition and Authority

Presidents have historically utilized various written instruments to direct the executive branch and implement policy.[2] These include executive orders, presidential memoranda, and presidential proclamations. The definitions of these instruments, including the differences between them, are not easily discernible, as the U.S. Constitution does not contain any provision referring to these terms or the manner in which the President may communicate directives to the executive branch. A widely accepted description of executive orders and proclamations comes from a report issued in 1957 by the House Government Operations Committee:

> Executive orders and proclamations are directives or actions by the President. When they are founded on the authority of the President derived from the Constitution or statute, they may have the force and effect of law.... In the narrower sense Executive orders and proclamations are written documents denominated as such.... Executive orders are generally directed to, and govern actions by, Government officials and agencies. They usually affect private individuals only indirectly. Proclamations in most instances affect primarily the activities of private individuals. Since the President has no power or authority over individual citizens and their rights except where he is granted such power and authority by a provision in the Constitution or by statute, the President's proclamations are not legally binding and are at best hortatory unless based on such grants of authority.[3]

[1] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 638 (1952) (Jackson, J. concurring) (stating that where a President "takes measures incompatible with the express or implied will of Congress" that "[c]ourts can sustain exclusive presidential control in such case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution ...").

[2] Other written instruments have historically included administrative orders, homeland security presidential directives, letters on tariffs and international trade, for example. For more background, *see* CRS Report 98-611, *Presidential Directives: Background and Overview*, by Elaine Halchin.

[3] Staff of House Comm. on Government Operations, 85th Cong., 1st Sess., Executive Orders and Proclamations: A (continued...)

The distinction between these instruments—executive orders, presidential memoranda, and proclamations—seems to be more a matter of form than of substance,[4] given that all three may be employed to direct and govern the actions of government officials and agencies.[5] Moreover, if issued under a legitimate claim of authority and made public, a presidential directive could have the force and effect of law, "of which all courts are bound to take notice, and to which all courts are bound to give effect."[6] The only technical difference is that executive orders must be published in the *Federal Register*, while presidential memoranda and proclamations are published only when the President determines that they have "general applicability and legal effect."[7]

Just as there is no definition of executive orders, presidential memoranda, and proclamations in the U.S. Constitution, there is, likewise, no specific provision authorizing their issuance. As such, authority for the execution and implementation of these written instruments stems from implied constitutional and statutory authority. In the constitutional context, presidential power is derived from Article II of the U.S. Constitution, which states that "the executive power shall be vested in a President of the United States," that "the President shall be Commander in Chief of the Army and Navy of the United States," and that the President "shall take Care that the Laws be faithfully executed."[8] The President's power to issue these directives may also derive from express or implied statutory authority.[9]

Despite the amorphous nature of the authority to issue executive orders, presidential memoranda, and proclamations, these instruments have been employed by every President since the inception of the Republic.[10] Notably, executive orders historically have been more contentious as Presidents have issued them over a wide range of controversial areas such as the establishment of internment

(...continued)

Study of a Use of Presidential Powers (Comm. Print 1957) [hereinafter Orders and Proclamations].

[4] *Id*.

[5] *See, e.g.*, Exec. Order No. 13658, 79 Fed. Reg. 9851 (February 12, 2014) (Establishing a Minimum Wage for Contractors); Exec. Order No. 13588, 76 Fed. Reg. 68295 (November 3, 2011) (Reducing Prescription Drug Shortages); Memorandum for Heads of Executive Dep't and Agencies on Advancing Pay Equality in the Federal Government and Learning From Successful Practices (May 10, 2013); Memorandum to Secretary of State on Waiver of Restriction on Providing Funds to the Palestinian Authority (February 8, 2013); Proclamation No. 9072, 78 Fed. Reg. 80417 (December 23, 2013) (To Take Certain Action Under the African Growth and Opportunity Act and for Other Purposes); Proclamation No. 8783, 77 Fed. Reg. 14265 (March 6, 2012) (To Implement the United States-Korea Free Trade Agreement).

[6] Armstrong v. United States, 80 U.S. 154, 155-56 (1871); *see also* Phillip J. Cooper, *By Order of the President: Administration by Executive Order and Proclamation*, 18 ADMINISTRATION & SOCIETY 233, 240 (August 1986) (citing Farkas v. Texas Instrument, Inc., 372 F.2d 629 (5th Cir. 1967); Farmer v. Philadelphia Electric Co., 329 F.2d 3 (3d Cir. 1964); Jenkins v. Collard, 145 U.S. 546, 560-61 (1893)).

[7] 44 U.S.C. §1505. The Federal Register Act requires that executive orders and proclamations be published in the *Federal Register*. *Id*. Furthermore, executive orders must comply with preparation, presentation, and publication requirements established by an executive order issued by President Kennedy. *See* Exec. Order No. 11030, 27 Fed. Reg. 5847 (1962) codified 1 C.F.R. Part 19.

[8] U.S. CONST., art. II, §§1-3. *See* Orders and Proclamations, *supra* note 3, at 6-12.

[9] *See* Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[10] *See, e.g.*, President George Washington's order of June 8, 1789, asking the heads of executive departments "to submit 'a clear account' of affairs connected with their [d]epartments," is listed as the first executive order in a 1943 publication. *See* New Jersey Historical Records Survey, Work Projects Administration, *List and Index of Presidential Executive Orders*, at 1 (1943). President Washington's first proclamations concerned A National Thanksgiving and treaties with Indian nations. James D. Richardson, *A Compilation of the Messages and Papers of the Presidents*, 1789-1897, Vol. I, at 64, 80-81 (1896).

camps during World War II;[11] the suspension of the writ of habeas corpus;[12] and equal treatment in the armed services without regard to race, color, religion, or national origin.[13] However, Presidents have also used executive orders for arguably more mundane governing tasks such as directing federal agencies to evaluate their ability to streamline customer service delivery[14] and establishing advisory committees.[15] Because there is no underlying constitutional or statutory authority that dictates the circumstances under which the President must issue an executive order, it is probable that the President also could have chosen to issue presidential memoranda rather than executive orders. As a matter or historical practice, however, it seems that Presidents are more apt to utilize executive orders on matters that may benefit from public awareness or be subject to heightened scrutiny. Memoranda, on the other hand, are often used to carry out routine executive decisions and determinations, or to direct agencies to perform duties consistent with the law or implement laws that are presidential priorities.[16]

Judicially Enforced Limitations

Presidents' broad usage of executive orders to effectuate policy goals has led some Members of Congress and various legal commentators to suggest that many such orders constitute unilateral executive lawmaking that impacts the interests of private citizens and encroaches upon congressional power.[17] The Supreme Court in *Youngstown Sheet & Tube Co. v. Sawyer* established the framework for analyzing whether the President's issuance of an executive order is a valid presidential action.[18] As discussed below, the framework established by Justice Robert H. Jackson in his concurring opinion has become more influential than the majority opinion authored by Justice Hugo Black, and has since been employed by the courts to analyze the validity of controversial presidential actions.

[11] Exec. Order No. 9066, 7 Fed. Reg. 1407 (February 25, 1942); *see also* Korematsu v. United States, 323 U.S. 214 (1944).

[12] *See, e.g.*, Executive Order from President Lincoln to Major-General H. W. Halleck, Commanding in the Department of Missouri (December 1861) *in* James D. Richardson, *A Compilation of the Messages and Papers of the Presidents*, 1789-1902, at 99 (Vol. VI) ("General: As an insurrection exists in the United States and is in arms in the State of Missouri, you are hereby authorized and empowered to suspend the writ of *habeas corpus* within the limits of the military division under your command and to exercise martial law as you find it necessary, in your discretion, to secure the public safety and the authority of the United States."); *see also Ex Parte* Milligan, 71 U.S. 2, 115 (1866).

[13] Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 28, 1948) ("It is hereby declared to be the policy of the President that there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin.").

[14] Exec. Order No. 13571, 76 Fed. Reg. 24339 (May 2, 2011).

[15] Exec. Order No. 13565, 76 Fed. Reg. 7681 (February 11, 2011).

[16] *See, e.g.*, Memorandum on Certification Concerning U.S. Participation in the United Nations Multidimensional Integrated Stabilization Mission in Mali, 79 Fed. Reg. 8077 (February 10, 2014); Memorandum on Waiving Prohibition on United States Military Assistance to Parties to the Rome Statute Establishing the International Criminal Court, 40 Weekly Comp. Pres. Doc. 561 (April 12, 2004).

[17] *See*, *e.g.*, William J. Olson and Alan Woll, Policy Analysis, *Executive Orders and National Emergencies: How Presidents Have Come to "Run the Country" by Usurping Legislative Power*, Cato Institute (October 28, 1999); Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1 (2002); John A. Sterling, *Above the Law: Evolution of Executive Orders (Part One)*, 31 UWLA REV. 99 (2000).

[18] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

Youngstown Sheet & Tube Co. v. Sawyer

In 1952, President Harry S. Truman, in an effort to avert the effects of a workers' strike during the Korean War, issued an executive order directing the Secretary of Commerce to take possession of most of the nation's steel mills to ensure continued production.[19] This order, challenged by the steel companies, was declared unconstitutional by the Supreme Court in *Youngstown*. Justice Black, writing for the majority, stated that under the Constitution, "the President's power to see that laws are faithfully executed refuted the idea that he is to be a lawmaker."[20] Specifically, Justice Black maintained that presidential authority to issue such an executive order, "if any, must stem either from an act of Congress or from the Constitution itself."[21] Applying this reasoning, the Court concluded the President's executive order was effectively a legislative act because no statute or constitutional provision authorized such presidential action.[22] The Court further noted that Congress rejected seizure as a means of settling labor disputes during consideration of the Taft-Hartley Act of 1947, and instead adopted other processes.[23] Given this characterization, the Court deemed the executive order to be an unconstitutional violation of the separation-of-powers doctrine, explaining that "the Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times."[24]

While Justice Black's majority opinion in *Youngstown* seems to refute the notion that the President possesses implied constitutional powers, it is important to note that there were five concurrences in the decision, four of which maintained that implied presidential authority adheres in certain contexts.[25] Of these concurrences, Justice Jackson's has proven to be the most influential, even surpassing the impact of Justice Black's majority opinion. Jackson's concurrence, as discussed below, is based on the proposition that presidential powers may be influenced by congressional action.

[19] Exec. Order No. 10340, 71 Fed. Reg. 3139 (April 10, 1952).

[20] *Youngstown*, 343 U.S. at 587.

[21] *Id.* at 585.

[22] *Id*. at 587 ("The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces.... Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President.... The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President.").

[23] *Id*. at 586 (citing 93 Cong. Rec. 3637-3645 where Congress rejected an amendment which would have authorized governmental seizures in cases of emergency); *see also* Taft-Hartley Act of 1947, P.L. 80-101 (1947).

[24] *Youngstown*, 343 U.S. at 586-89.

[25] *Id.* at 610-11 (Frankfurter, J., concurring) ("[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II."); *id.* at 635 (Jackson, J., concurring); *id.* at 659 (Burton, J., concurring) ("The present situation is not comparable to that of an imminent invasion of threatened attack. We do not face the issue of what might be the President's constitutional power to meet such catastrophic situations."); *id.* at 661 (Clark, J., concurring in result only) ("[W]here Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures ...; but that in the absence of such action by Congress, the President's independent power to act depends upon the gravity of the situation confronting the nation.").

Justice Jackson's Concurrence in *Youngstown*

In his concurring opinion, Justice Jackson established a tripartite scheme for analyzing the validity of presidential actions in relation to constitutional and congressional authority. Because "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress," Justice Jackson acknowledged that the three categories he established were a "somewhat over-simplified grouping," but they nonetheless assist in identifying "practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity."[26]

Under the tripartite scheme, the President's authority to act is considered at a maximum when he acts pursuant to an express or implied authorization of Congress because this includes "all that he possesses in his own right plus all that Congress can delegate."[27] Such action "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation."[28]

However, where Congress has neither granted nor denied authority to the President, Justice Jackson maintained that the President could still act upon his own independent powers. For this second category, there is a "zone of twilight in which [the President] and Congress may have concurrent authority, or in which distribution is uncertain."[29] Under these circumstances, Justice Jackson observed that congressional acquiescence or silence "may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility," yet "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[30]

In contrast, the President's authority is considered at its "lowest ebb" when he "takes measures incompatible with the express or implied will of Congress ... for he can only rely upon his own constitutional powers minus any constitutional powers of Congress over the matter."[31] Justice Jackson observed that courts generally "sustain exclusive presidential control ... only by disabling the Congress from acting upon the subject."[32] He cautioned that examination of presidential action under this third category deserved more scrutiny because for the President to exercise such "conclusive and preclusive" power would endanger "the equilibrium established by our constitutional system."[33]

Applying this framework to President Truman's action, Justice Jackson determined that analysis under the first category was inappropriate, due to the fact that seizure of the steel mills had not been authorized by Congress, either implicitly or explicitly. Justice Jackson also determined that the President Truman's action could not be defended under the second category because Congress

[26] *Id*. at 635 (Jackson, J., concurring). Along similar lines, the Supreme Court later observed "it is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition." Dames & Moore v. Regan, 453 U.S. 654, 669 (1981).

[27] *Id*. at 635-637 (Jackson, J. concurring).

[28] *Id.*

[29] *Id*. at 637.

[30] *Id*.

[31] *Id*. at 637.

[32] *Id*.

[33] *Id.* at 638.

had addressed the issue of seizure through statutory policies that conflicted with the President's action.[34] Justice Jackson concluded that the President's action could be sustained only if it passed muster under the third category, that is, by finding "that seizure of such strike-bound industries is within his domain and beyond the control of Congress."[35] Specifically, the President would have to rely on "any remainder of executive power after such powers as Congress may have over the subject" to lawfully seize steel mills. Given that the seizure of steel mills was within the scope of congressional power, the exercise of presidential power under these circumstances was "most vulnerable to attack and [left the President] in the least favorable of possible constitutional postures."[36]

Justice Jackson's framework for analyzing the validity of presidential actions has endured into the modern era.[37] For example, the Supreme Court in *Dames & Moore v. Regan* referenced Justice Jackson's analytical framework when it upheld executive orders and agency regulations that nullified all non-Iranian interests in Iranian assets and suspended all settlement claims.[38] Because the President had been delegated broad authority under the International Emergency Economic Powers Act to nullify non-Iranian interests, the Court, invoking Justice Jackson's first category, stated that such action "is supported by the strongest presumption and the widest latitude of judicial interpretation."[39] With respect to the suspension of claims, the Court upheld the President's action on the basis that Congress had enacted legislation in the area of the President's authority to deal with international crises and had "implicitly approved the longstanding practice of claims settlements by executive agreement."[40]

However, not all courts necessarily invoke Justice Jackson's tripartite framework in evaluating executive orders and actions. For instance, in 1995 the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *Chamber of Commerce v. Reich* overturned an executive order issued by President William J. Clinton by using traditional tools of statutory interpretation.[41] Relying on his authority pursuant to the Federal Property and Administrative Services Act (FPASA),[42] President Clinton issued Executive Order 12954, which directed the Secretary of Labor to adopt such rules and orders as necessary to ensure that federal agencies would not

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[34] *Id.* at 638-39 ("None of the [three statutory methods] were invoked. In choosing a different and inconsistent way of his own, the President cannot claim that it is necessitated or invited by failure of Congress to legislate upon the occasions, grounds and methods for seizure of industrial properties.").

[35] *Id.* at 640.

[36] *Id*.

[37] *See*, *e.g.*, Medellin v. Texas, 552 U.S. 491 (2008) (holding that a presidential memorandum does not constitute directly enforceable law and does not preempt state limitations on the filing of successive habeas petitions, nor can the President unilaterally execute a non-self-executing treaty by giving it domestic effect, as the power to implement such a treaty falls to Congress); American Int'l Grp. v. Islamic Republic of Iran, 657 F.2d 430 (D.C. Cir. 1981) (upholding executive orders revoking licenses that had been issued by the federal government and that suspended claims because President had authority pursuant to the International Emergency Economic Powers Act).

[38] Dames & Moore v. Regan, 453 U.S. 654 (1982).

[39] *Id*. at 674.

[40] *Id*. at 675-88. The Court emphasized the narrowness of its decision, stating that it did not decide "that the President possesses plenary power to settle claims, even as against foreign governmental entities.... But where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims." *Id*. at 688.

[41] Chamber of Commerce of the United States v. Reich, 74 F.3d 1322 (1996).

[42] 40 U.S.C. §§471 *et seq*.

contract with employers that permanently replaced striking employees.[43] The D.C. Circuit in *Reich* did not invoke or refer to the *Youngstown* decision when reviewing the validity of the executive order.[44] The court nonetheless determined that President Clinton's executive order, although issued pursuant to broad authority delegated to him under FPASA, was invalid and without legal effect because it conflicted with a provision of the National Labor Relations Act, which guarantees the right to hire permanent replacements during strikes.[45]

Presidential Revocation and Modification of Executive Orders

Executive orders are undoubtedly one of many tools available to Presidents to further policy goals during his Administration. By their very nature, however, executive orders lack stability, especially in the face of evolving presidential priorities. The President is free to revoke, modify, or supersede his own orders or those issued by a predecessor.[46]

The practice of Presidents modifying and revoking executive orders is exemplified particularly where orders have been issued to assert control over and influence the agency rulemaking process. Beginning with President Gerald Ford's Administration, the following timeline demonstrates the gradual modification by succeeding Presidents in supplementing the congressionally mandated rulemaking process with a uniform set of standards regarding cost-benefit considerations.[47]

- President Gerald Ford issued Executive Order 11821, which required agencies to issue inflation impact statements for proposed regulations.[48]
- President Jimmy Carter altered this practice with Executive Order 12044, which required agencies to consider the potential economic impact of certain rules and identify potential alternatives.[49]
- President Ronald Reagan revoked President Carter's order and implemented a scheme that arguably asserted much more extensive control over the rulemaking process. He issued Executive Order 12291, which directed agencies to implement rules only if the "potential benefits to society for the regulation outweigh the

[43] Exec. Order No. 12954, 60 Fed. Reg. 13023 (March 10, 1995).

[44] *Reich*, 74 F.3d at 1322.

[45] *Id.* at 1339.

[46] For example, on February 17, 2001, President George W. Bush issued several executive orders that revoked several of President Clinton's executive orders regarding union dues and labor contracts, significantly altering several requirements pertaining to government contracts. *See* Exec. Orders Nos. 13201-04, 66 Fed. Reg. 11221, 11225, 11227-28 (2001) (revoking Exec. Order No. 12871, 58 Fed. Reg. 52201 (1993); Exec. Order 12933, 59 Fed. Reg. 53559 (1994)). President Obama subsequently revoked the Bush orders. *See* Exec. Order No. 13496, 74 Fed. Reg. 6107 (February 4, 2009) (revoking Exec. Order No. 13201); Exec. Order No. 13502, 74 Fed. Reg. 6985 (February 11, 2009) (revoking Exec. Order No. 13202); Exec. Order No. 13495, 74 Fed. Reg. 6103 (February 4, 2009) (revoking Exec. Order No. 13204).

[47] Administrative Procedure Act, 5 U.S.C. §§551 *et seq*. For other laws affecting the rulemaking process, *see* CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, coordinated by Maeve P. Carey.

[48] Exec. Order No. 11821, 3 C.F.R. 926 (1971-75).

[49] Exec. Order No. 12044, 3 C.F.R. 152 (1978).

potential costs to society."[50] This required agencies to prepare a cost-benefit analysis for any proposed rule that could have a significant economic impact.[51]

- President William J. Clinton later issued Executive Order 12866, which modified the system established during the Reagan Administration.[52] While retaining many of the basic features of President Reagan's order, Executive Order 12866 arguably eased cost-benefit analysis requirements, and recognized the primary duty of agencies to fulfill the duties committed to them by Congress.
- President George W. Bush subsequently issued two executive orders—Executive Orders 13258 and 13422—both of which amended the Clinton executive order.[53] Executive Order 13258 concerned regulatory planning and review, and it removed references from Clinton's executive order regarding the role of the Vice President, and instead referenced the Director of the Office of Management and Budget (OMB) or the Chief of Staff to the President.[54] Executive Order 13422 defined guidance documents and significant guidance documents and applied several parts of the Clinton executive order to guidance documents.[55] It also required each agency head to designate a presidential appointee to the newly created position of regulatory policy officer. Executive Order 13422 also made changes to the Office of Information and Regulatory Affairs' (OIRA) duties and authorities, including a requirement that OIRA be given advance notice of significant guidance documents.

President Barack Obama revoked both of these orders via Executive Order 13497.[56] This order also instructed the Director of OMB and the heads of executive departments and agencies to rescind orders, rules, guidelines, and policies that implemented President Bush's executive orders.[57] In addition, President Obama issued two other executive orders on the regulatory review process. The first, Executive Order 13563, reaffirmed and supplemented the principles of regulatory review in Executive Order 12866.[58] Obama's order addressed public participation and agency coordination in simplifying and harmonizing regulations for industries with significant regulatory requirements.[59] The order also instructed agencies to consider flexible approaches to

[50] Exec. Order No. 12291, 3 C.F.R. 127, 128 (1981).

[51] Executive Order 12291 was criticized by some as a violation of the separation-of-powers doctrine, on grounds that it imbued the President with the power to essentially control rulemaking authority that had been committed to a particular agency by Congress. *See, e.g.*, Morton Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12291*, 80 MICH. L. REV. 193 (1981); Erik D. Olsen, *The Quiet Shift of Power: OMB Supervision of EPA Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT. RES. L. 1 (1984). Despite these concerns there were no court rulings that assessed the validity of President Reagan's order.

[52] Exec. Order No. 12866, 58 Fed. Reg. 51735 (October 4, 1993).

[53] Exec. Order No. 13258, 67 Fed. Reg. 9385 (February 28, 2002); Exec Order No. 13422, 72 Fed. Reg. 2763 (January 23, 2007).

[54] Exec. Order No. 13528, 67 Fed. Reg. 9385 (February 28, 2002).

[55] Exec. Order No. 13422, 72 Fed. Reg. 2763 (January 23, 2007). For more information on how Executive Order 13423 (now revoked) impacted Executive Order 12866, *see* CRS Report RL32397, *Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs*, coordinated by Maeve P. Carey.

[56] Exec. Order No. 13497, 74 Fed. Reg. 6113 (February 4, 2009) (revoking Executive Orders 13528 and 13422).

[57] *Id.*

[58] Exec. Order No. 13563, 76 Fed. Reg. 3821 (January 21, 2011); *see also* Cass R. Sunstein, Administrator, OIRA, Memorandum for the Heads of Executive Departments and Agencies, and of Independent Regulatory Agencies, on Executive Order 13563, "Improving Regulation and Regulatory Review" (February 2, 2011), at 1.

[59] Exec. Order No. 13563, §§2-3.

regulation, required them to ensure the objectivity of scientific and technical information and processes that support regulations, and mandated that agencies develop a preliminary plan to review existing significant regulations for potential modifications or repeal.[60] The second executive order, Executive Order 13579, stated that independent regulatory agencies should also comply "to the extent permitted by law" with the goals and requirements of the first order, Executive Order 13563.[61]

Congressional Revocation and Modification of Executive Orders

Congress may also influence the duration and effectiveness of executive orders. Orders issued pursuant to authority provided to the President by Congress, as distinguished from orders that are based on the President's exclusive constitutional authority, may be legislatively modified or nullified.[62] Congress may revoke all or part of such an order by either directly repealing the order, or by removing the underlying authority upon which the action is predicated.[63] Either of these actions would appear to negate the legal effect of the order.

Congressional repeals of executive orders are relatively rare in modern times, primarily because such legislation could run counter to the President's interests and therefore may require a congressional override of a presidential veto. One study has suggested that less than 4% of executive orders have been modified by Congress.[64] To effectuate a repeal, Congress need only enact legislation directing that provisions of the executive order "shall not have legal effect."[65] For example, the Energy Policy Act of 2005 explicitly revoked a December 13, 1912, executive order that had created the Naval Petroleum Reserve Numbered 2.[66] In 1992, Congress similarly revoked an executive order issued by President George H. W. Bush that had directed the Secretary of Health and Human Services to establish a human fetal tissue bank for research

[60] *Id*. at §§4-6.

[61] Exec. Order No. 13579, 76 Fed. Reg. 41587 (July 14, 2011). Generally speaking, executive orders on regulatory review have exempted independent regulatory agencies from their requirements by referencing a statutory definition of an independent regulatory agency that contains a list of such agencies. 44 U.S.C. §3502. For more analysis, *see* CRS Report R42720, *Presidential Review of Independent Regulatory Commission Rulemaking: Legal Issues*, by Vivian S. Chu and Daniel T. Shedd.

[62] *Youngstown*, 343 U.S. at 635-38. Consistent with the *Youngstown* framework, Congress's authority to override an executive order relating to an area in which the President and Congress share power would likely depend on "the imperatives of events and contemporary imponderables. *See id*. at 637 ("[T]here is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.").

[63] Congress may also affect executive orders by amending the language to include a sunset provision. If Congress lets the sunset provision lapse, the President would no longer have the authority under the statute to act. For example, Executive Order 11399 established the National Council on Indian Opportunity (NCIO). This executive order was later amended by Executive Order 11688. In 1969, Congress appropriated funds to continue the NCIO for five years at which time it would terminate unless reauthorized by Congress. The NCIO is no longer in existence.

[64] *See* Adam L. Warber, Executive Orders and the Modern Presidency 118-120 (2006).

[65] For a listing of executive orders affected by Congress, *see* William J. Olson and Alan Woll, *Executive Orders and National Emergencies: How Presidents Have Come to "Run the Country" by Usurping Legislative Power*, available at House Comm. on Rules, Subcomm. on Legislative and Budget Process, 106th Cong., 1st Sess., Hearing on the Impact of Executive Orders on Lawmaking: Executive Lawmaking?, at 124-27 (October 27, 1999).

[66] P.L. 109-58, §334 (2005); 10 U.S.C. §7420 note.

purposes. The repeal legislation stated that "[t]he provisions of Executive Order 12806 ... shall not have any legal effect."[67]

Additionally, Congress may also inhibit the implementation of an executive order by preventing funds from being used to implement the order. For example, Congress has used its appropriations authority to limit the effect of executive orders by denying salaries and expenses for an office established in an executive order,[68] or by directly denying funds to implement a particular section of an order.[69]

Conversely, if Congress supports an executive order, and wants to provide the directive with greater stability, Congress may codify the presidential order as it was issued or with certain modifications.[70] Similarly, if the President issues an executive order on questionable legal authority, Congress may subsequently ratify the order either expressly or by implication.[71]

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[67] P.L. 103-43, §121; 107 Stat. 133 (1993). *See also* H.R. 5658, §2587 (110th Cong., 2d sess.) (would have revoked Executive Order 1922 of April 24, 1914, as amended, as it affected certain lands identified for conveyance to Utah).

[68] Congress has repeatedly enacted appropriations laws, which prohibit funds from being used to establish a Legal Examining Unit within the Office of Personnel Management (OPM) pursuant to Executive Order 9358, 8 Fed. Reg. 9175 (July 6, 1943), issued by President Franklin D. Roosevelt. President Roosevelt had discretionary authority pursuant to statute to issue regulations, via executive order, to organize the civil service and direct the Civil Service Commission, the precursor to OPM. *See* P.L. 76-880, §1 (1940) and Exec. Order No. 8743, 6 Fed. Reg. 2117 (April 25, 1941). Appropriations laws that contain this prohibition include P.L. 105-61; 111 Stat. 1302 (1997); P.L. 105-277; 112 Stat. 2681-509 (1998); P.L. 106-58; 113 Stat. 462 (1999); P.L. 106-554; 114 Stat. 2763A-149 (2000); P.L. 107-67; 115 Stat. 541 (2001); P.L. 108-7; 117 Stat. 458 (2003); P.L. 108-199; 118 Stat. 338 (2004); P.L. 108-447; 118 Stat. 3262 (2004); P.L. 109-115; 119 Stat. 2488 (2005); P.L. 110-161; 121 Stat. 2008-09 (2007); P.L. 111-8; 123 Stat. 669 (2009); P.L. 111-117; 123 Stat. 3195 (2009).

[69] *See, e.g.*, P.L. 111-8, §746; 123 Stat. 693 (2009) (preventing funds from being used "to implement, administer, or enforce" §5(b) of Executive Order 13422, which was subsequently revoked by Executive Order 13497).

[70] For example, the Homeland Security Council (HSC) was first established by Section 5 of Executive Order 13228, 66 Fed. Reg. 51812-17 (October 10, 2001). Congress later passed the Homeland Security Act of 2002, P.L. 107-296 (2002). Title IX of the law established the HSC within the Executive Office of the President. *See also* Health Equity and Accountability Act, H.R. 3090, §421 (111th Cong., 1st sess.) (would have codified Executive Order 12898).

[71] *See, e.g.*, Muller Optical Co. v. EEOC, 574 F. Supp. 946, 953 (W.D. Tenn. 1983) ("Congressional ratification may occur when both Houses of Congress either pass legislation appropriating funds to implement the executive order or make reference to the executive order in subsequently passed legislation.").